

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JAMES NEMETH,

Plaintiff,

v.

PATRICK COVELLO, et al.,

Defendants.

No. 2:23-cv-2572 CKD P

ORDER

Plaintiff is a state prisoner proceeding pro se in this civil rights action filed pursuant to 42 U.S.C. § 1983. This proceeding was referred to this court by Local Rule 302 pursuant to 28 U.S.C. § 636(b)(1).

I. Motion for the Appointment of Counsel

Plaintiff has requested the appointment of counsel. ECF No. 6. District courts lack authority to require counsel to represent indigent prisoners in section 1983 cases. Mallard v. United States Dist. Court, 490 U.S. 296, 298 (1989). In exceptional circumstances, the court may request an attorney to voluntarily represent such a plaintiff. See 28 U.S.C. § 1915(e)(1); Terrell v. Brewer, 935 F.2d 1015, 1017 (9th Cir. 1991); Wood v. Housewright, 900 F.2d 1332, 1335-36 (9th Cir. 1990). When determining whether “exceptional circumstances” exist, the court must consider plaintiff’s likelihood of success on the merits as well as the ability of the plaintiff to articulate his claims pro se in light of the complexity of the legal issues involved. Palmer v.

1 Valdez, 560 F.3d 965, 970 (9th Cir. 2009) (district court did not abuse discretion in declining to
2 appoint counsel). The burden of demonstrating exceptional circumstances is on the plaintiff. Id.
3 Circumstances common to most prisoners, such as lack of legal education and limited law library
4 access, do not establish exceptional circumstances that warrant a request for voluntary assistance
5 of counsel.

6 Having considered the factors under Palmer, the court finds that plaintiff has failed to
7 meet his burden of demonstrating exceptional circumstances warranting the appointment of
8 counsel at this time.

9 II. Screening Requirement

10 The court is required to screen complaints brought by prisoners seeking relief against a
11 governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The
12 court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally
13 “frivolous or malicious,” that fail to state a claim upon which relief may be granted, or that seek
14 monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1), (2).

15 A claim is legally frivolous when it lacks an arguable basis either in law or in fact.
16 Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28 (9th
17 Cir. 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an
18 indisputably meritless legal theory or where the factual contentions are clearly baseless. Neitzke,
19 490 U.S. at 327. The critical inquiry is whether a constitutional claim, however inartfully
20 pleaded, has an arguable legal and factual basis. See Jackson v. Arizona, 885 F.2d 639, 640 (9th
21 Cir. 1989); Franklin, 745 F.2d at 1227.

22 A complaint, or portion thereof, should only be dismissed for failure to state a claim upon
23 which relief may be granted if it appears beyond doubt that plaintiff can prove no set of facts in
24 support of the claim or claims that would entitle him to relief. Hishon v. King & Spalding, 467
25 U.S. 69, 73 (1984) (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)); Palmer v. Roosevelt
26 Lake Log Owners Ass’n, 651 F.2d 1289, 1294 (9th Cir. 1981). In reviewing a complaint under
27 this standard, the court must accept as true the allegations of the complaint in question, Hosp.
28 Bldg. Co. v. Rex Hosp. Trustees, 425 U.S. 738, 740 (1976), construe the pleading in the light

1 most favorable to the plaintiff, and resolve all doubts in the plaintiff's favor, Jenkins v.
2 McKeithen, 395 U.S. 411, 421 (1969).

3 **III. Allegations in the Complaint**

4 At all times relevant to the allegations in the complaint, plaintiff was an inmate at Mule
5 Creek State Prison. Plaintiff names the warden, assistant warden, mail room supervisor, and an
6 "OSS II" prison employee as defendants in this action.

7 In claim one, plaintiff alleges that his veteran's disability benefit checks were delayed by
8 prison officials for up to 60 days, violating a federal law which requires that all veteran benefit
9 payments be delivered on the first day of each month and available for use the next day. ECF No.
10 1 at 3. As a result of this delay, plaintiff experienced increased anxiety and PTSD symptoms. Id.

11 In claim two, plaintiff asserts a First Amendment retaliation and Fifth Amendment due
12 process claim based on the arbitrary rejection and confiscation of books that he ordered. ECF No.
13 1 at 4. Although plaintiff lists specific books that he ordered but never received, he does not
14 name any specific prison official who was responsible for depriving him of this property. Id.

15 The last claim alleged in the complaint is based on the delayed delivery of both incoming
16 and outgoing prison mail since November 2022. ECF No. 1 at 5. Plaintiff specifically identifies
17 delays in receiving his veteran's benefits, letters from the IRS, medical documents sent to his
18 mother, and a check that he sent to his son. Id.

19 **IV. Legal Standards**

20 **A. Linkage Requirement**

21 The civil rights statute requires that there be an actual connection or link between the
22 actions of the defendants and the deprivation alleged to have been suffered by plaintiff. See
23 Monell v. Department of Social Services, 436 U.S. 658 (1978); Rizzo v. Goode, 423 U.S. 362
24 (1976). The Ninth Circuit has held that "[a] person 'subjects' another to the deprivation of a
25 constitutional right, within the meaning of section 1983, if he does an affirmative act, participates
26 in another's affirmative acts or omits to perform an act which he is legally required to do that
27 causes the deprivation of which complaint is made." Johnson v. Duffy, 588 F.2d 740, 743 (9th
28 Cir. 1978) (citation omitted). In order to state a claim for relief under section 1983, plaintiff must

link each named defendant with some affirmative act or omission that demonstrates a violation of plaintiff's federal rights.

B. Supervisory Liability

Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of respondeat superior. Ashcroft v. Iqbal, 556 U.S. 662, 677 (2009) (“In a § 1983 suit ... the term “supervisory liability” is a misnomer. Absent vicarious liability, each Government official, his or her title notwithstanding is only liable for his or her own misconduct.”). When the named defendant holds a supervisory position, the causal link between the defendant and the claimed constitutional violation must be specifically alleged; that is, a plaintiff must allege some facts indicating that the defendant either personally participated in or directed the alleged deprivation of constitutional rights or knew of the violations and failed to act to prevent them. See Fayle v. Stapley, 607 F.2d 858, 862 (9th Cir. 1979); Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989); Mosher v. Saalfeld, 589 F.2d 438, 441 (9th Cir. 1978).

C. Mail Interference

Under the First Amendment, prisoners have a right to send and receive mail. Witherow v. Paff, 52 F.3d 264, 265 (9th Cir. 1995) (per curiam). However, a prison may adopt regulations or practices for inmate mail which limit a prisoner's First Amendment rights as long as the regulations are “reasonably related to legitimate penological interests.” Turner v. Safley, 482 U.S. 78, 89, (1987). “When a prison regulation affects outgoing mail as opposed to incoming mail, there must be a ‘closer fit between the regulation and the purpose it serves.’” Witherow, 52 F.3d at 265 (quoting Thornburgh v. Abbott, 490 U.S. 401, 412 (1989)). Courts have also afforded greater protection to legal mail than non-legal mail. See Thornburgh, 490 U.S. at 413. Isolated incidents of mail interference or tampering will not support a claim under section 1983 for violation of plaintiff's constitutional rights. See Davis v. Goord, 320 F.3d 346, 351 (2d. Cir. 2003); Gardner v. Howard, 109 F.3d 427, 431 (8th Cir. 1997); Smith v. Maschner, 899 F.2d 940, 944 (10th Cir. 1990); see also Crofton v. Roe, 170 F.3d 957, 961 (9th Cir. 1999) (emphasizing that a temporary delay or isolated incident of delay of mail does not violate a prisoner's First Amendment rights). Generally, such isolated incidents must be accompanied by evidence of an

improper motive on the part of prison officials or result in interference with an inmate's right of access to the courts or counsel in order to rise to the level of a constitutional violation. See Smith, 899 F.2d at 944.

D. Retaliation

“Within the prison context, a viable claim of First Amendment retaliation entails five basic elements: (1) An assertion that a state actor took some adverse action against an inmate (2) because of (3) that prisoner's protected conduct, and that such action (4) chilled the inmate's exercise of his First Amendment rights, and (5) the action did not reasonably advance a legitimate correctional goal. Rhodes v. Robinson, 408 F.3d 559 567-68 (9th Cir. 2005) (citations omitted). Filing an inmate grievance is a protected action under the First Amendment. Bruce v. Ylst, 351 F.3d 1283, 1288 (9th Cir. 2003).

E. Property Claims

The United States Supreme Court has held that “an unauthorized intentional deprivation of property by a state employee does not constitute a violation of the procedural requirements of the Due Process Clause of the Fourteenth Amendment if a meaningful postdeprivation remedy for the loss is available.” Hudson v. Palmer, 468 U.S. 517, 533 (1984). Thus, where the state provides a meaningful postdeprivation remedy, only authorized, intentional deprivations constitute actionable violations of the Due Process Clause. An authorized deprivation is one carried out pursuant to established state procedures, regulations, or statutes. Piatt v. McDougall, 773 F.2d 1032, 1036 (9th Cir. 1985); see also Knudson v. City of Ellensburg, 832 F.2d 1142, 1149 (9th Cir. 1987).

V. Analysis

After conducting the required screening, the court finds that the complaint fails to state a claim upon which relief may be granted against any defendant. See 28 U.S.C. § 1915A(b)(1). Plaintiff fails to link any defendant to the asserted violation of his constitutional rights. In order to state a claim, plaintiff must link each named defendant with some affirmative act or omission that demonstrates a violation of plaintiff's federal rights. Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978). Regarding the allegations of delayed mail, the complaint does not allege any

improper motive on the part of prison officials or any interference with plaintiff's right of access to the courts or counsel. Absent such assertions and with only pecuniary harm alleged, claims one and three do not rise to the level of a constitutional violation. See Smith, 899 F.2d at 944. In claim two, plaintiff has not alleged any facts which suggest that the deprivation of his books was not authorized. The California Legislature has provided a remedy for tort claims against public officials in the California Government Code, §§ 900, et seq. As plaintiff has not attempted to seek redress in the state system, he cannot sue in federal court on the claim that the state deprived him of property without due process of the law. For all these reasons, the complaint must be dismissed. The court will, however, grant leave to file an amended complaint.

If plaintiff chooses to amend the complaint, plaintiff must demonstrate how the conditions complained of have resulted in a deprivation of plaintiff's constitutional rights. See Ellis v. Cassidy, 625 F.2d 227 (9th Cir. 1980). Also, the complaint must allege in specific terms how each named defendant is involved. There can be no liability under 42 U.S.C. § 1983 unless there is some affirmative link or connection between a defendant's actions and the claimed deprivation. Rizzo v. Goode, 423 U.S. 362 (1976); May v. Enomoto, 633 F.2d 164, 167 (9th Cir. 1980); Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978). Furthermore, vague and conclusory allegations of official participation in civil rights violations are not sufficient. Ivey v. Bd. of Regents, 673 F.2d 266, 268 (9th Cir. 1982).

In addition, plaintiff is informed that the court cannot refer to a prior pleading in order to make plaintiff's amended complaint complete. Local Rule 220 requires that an amended complaint be complete in itself without reference to any prior pleading. This is because, as a general rule, an amended complaint supersedes the original complaint. See Loux v. Rhay, 375 F.2d 55, 57 (9th Cir. 1967). Once plaintiff files an amended complaint, the original pleading no longer serves any function in the case. Therefore, in an amended complaint, as in an original complaint, each claim and the involvement of each defendant must be sufficiently alleged.

VI. Plain Language Summary for Pro Se Party

The following information is meant to explain this order in plain English and is not intended as legal advice.

1 The court has reviewed the allegations in your complaint and determined that they do not
2 state any claim against the defendants. Your complaint is being dismissed, but you are being
3 given the chance to fix the problems identified in this screening order.

4 Although you are not required to do so, you may file an amended complaint within 30
5 days from the date of this order. If you choose to file an amended complaint, pay particular
6 attention to the legal standards identified in this order which may apply to your claims.

7 Accordingly, IT IS HEREBY ORDERED that:

8 1. Plaintiff's motion to proceed in forma pauperis (ECF No. 5) is denied as moot based on
9 his payment of the filing fee on December 19, 2023.

10 2. Plaintiff's request for the appointment of counsel (ECF No. 6) is denied without
11 prejudice.

12 3. Plaintiff's complaint is dismissed.

13 4. Plaintiff is granted thirty days from the date of service of this order to file an amended
14 complaint that complies with the requirements of the Civil Rights Act, the Federal Rules of Civil
15 Procedure, and the Local Rules of Practice; the amended complaint must bear the docket number
16 assigned this case and must be labeled "Amended Complaint"; and, failure to file an amended
17 complaint in accordance with this order will result in a recommendation that this action be
18 dismissed.

19 Dated: April 7, 2024



CAROLYN K. DELANEY
UNITED STATES MAGISTRATE JUDGE

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